United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6054
75-6055

ORIGINAL

B

To be argued by
H. ELLIOT WALES

In The

United States Court of Appeals

For The Second Circuit

P/S

LUIS A. LEBRON, JR.,

Appellant,

vs.

THE UNITED STATES SECRETARY OF THE AIR FORCE,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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LUIS A. LEBRON, JR.,

Appellant,

-against-

UNITED STATES SECRETARY OF THE AIR FORCE,

Respondent.

Docket 75-6054
75-6055

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APPELLANT LEBRON'S REPLY BRIEF

The appellant Luis Lebron submits this brief in reply to the answering brief of the government.

JURISDICTION

Judge Pollack did not find a problem as to his jurisdiction to review the narcotic conviction. He found that he had jurisdiction, and then promptly proceeded to discuss the petition on its merits in full. In this regard he wrote (3a):

> "Under certain circumstances where merits have been established, jurisdiction of the courts to review a court martial decision has been found proper, even though habeas corpus jurisdiction would not lie because the plaintiff was not in custody."

Also see the several cases cited by the District Court at that point and in footnote 2 that follows:

The assault conviction had followed the narcotic conviction in point of time. A three year sentence had been imposed upon the latter assault conviction. As Lebron was a second offender at that point, his sentence was more substantial than had he been a first offender. As such Lebron suffered collateral consequences as to the assault conviction as a result of the earlier narcotic conviction. fn.

CONSTITUTIONALITY OF ARTICLE 134

Except for Justice Blackmun's sole concurring opinion (417 U.S. at 763), in which no other member of the court joined him, the government could not point to any language in Parker v. Levy (417 U.S. 733) to support its position that a common law or civilian offense, like

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fn. Both collateral proceedings were originally commenced in 1973 in the United States District Court for the District of Columbia. Docket numbers 2223/73 and 2224/73. The collateral attack upon the narcotic conviction was stayed by the District Court while Parker v. Levy, 417 U.S. 733, was pending. After the Supreme Court decided that case, Lebron moved for summary judgment in both proceedings, and the government cross-moved for summary judgment. In October 1974 Chief Judge George Hart transferred both actions to the Southern District of New York. The motions and cross-motions for summary judgment were renewed before Judge Pollack. Lebron was in prison at the time that the action was commenced in the District of Columbia. Subsequently he was paroled.

possession of a narcotic drug, is properly covered by Article 134.

The government in no way seeks to qualify or minimize those portions of Parker v. Levy, quoted by Lebron in his main brief. Nor does the government in any way answer the issue as posed by the High Court itself, namely, that Article 134 was designed to "regulate aspects of the conduct of the military which in the civilian sphere are left unregulated". 417 U. S. at_____.

In no way did Congress ever intend that Article 134 should apply to a drug offense. Neither the language, nor purpose nor history of Article 134 supply any inkling or notice to anyone (including Lebron) that a narcotic prohibition was contemplated by Article 134.

NEW TRIAL APPLICATION

In its answering brief the government poses the issue (page 2): "Does due process require the trial judge to rule on every motion for a new trial"?

In our case the trial judge did not rule on a single such motion. More important the motion for the new trial was never presented to the trial judge or to the trial court. It was considered in the first instance by the convening authority. 7a. Subsequently the Court of Military Review reviewed the ex parte investigative report, and denied the new trial

application on the strength of that report ("We have on our own initiative examined that investigation" - page 5a of the government appendix). Also the government argued that there was no constitutional requirement that a new trial application be heard by the original trial judge (page 9). In this regard the government raises the totally unrelated problem of the trial judge who has since deceased. In our situation the original trial judge was very much alive - a factor the government prefers to ignore. The real problem was that the new trial application was not submitted to the trial court - be it this particular trial judge or any other trial judge who could take his place. The application was first considered by the convening authority and his staff. The Court of Military Review focused on whether the convening authority had properly denied the motion - as if the convening authority were a judicial officer acting within the realm of discretion, subject only to appellate review as to whether that discretion was improperly exercised.

The government passes over the plaintiff's contention that the "right to decide" remains with the trial court. The trial court decides whether the application requires an evidentiary hearing, or merely oral argument, or even could be decided on submission. The trial court decides what response, if any, it wants from the prosecution. The trial court alone decides what weight, if any, it wishes to give to an ex parte

investigative report of the prosecution. In short, the trial court decides on all trial court proceedings.

In our case the trial court was completely ignored and by-passed. Due process requires that the trial court alone decide initially such an application. An ything else deprives the defendant to the judicial protection of an independent judicial presiding officer.

THE SEARCH WARRANT

The government in its brief (page 8) does not cite a single federal court case to support its position that the United States Constitution tolerates a military search warrant issued upon an oral and unsworn statement of a federal agent. Military court citations have little persuasion in the federal court when confronted by the many land mark decisions of the Supreme Court. As the issue involved the Fourth Amendment, the federal courts will have to decide for themselves, based upon its own constitutional notions, just what the constitution requires. The lesser standards of the military courts are of little consequence.

Respectfully submitted,

Dated: October 9, 1975

H. ELLIOT WALES
Counsel for Appellant Lebron

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS A. LEBRON, JR.

Appellant,

- against -

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Appellee.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 10th *day of* October *19* 75 *at* 1 St. Andrews Plaza, N.Y., N.Y.

deponent served the annexed Reply Brief *upon*

Paul J. Curran

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 10th *day of* October *19* 75

Robert T. Brian

James A. Steele
JAMES A. STEELE

ROBERT T. BRIAN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977